

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: WEDNESDAY, JULY 22, 2009
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

Chairperson Laura Thielen called the meeting of the Board of Land and Natural Resources to order at 9:09 a.m. The following were in attendance:

MEMBERS

Laura Thielen
David Goode
Ron Agor
Dr. Sam Gon

Robert Pacheco
Jerry Edlao
John Morgan

STAFF

Morris Atta/LAND
Dan Quinn/SP
Barry Cheung/LAND
Athline Clark/DAR
Lila Loos/ADMIN
Kamaile Nichols/DAR

Sam Lemmo/OCCL
Ed Underwood/DOBOR
Dan Polhemus/DAR
Paul Conry/DOFAW
Bin Li/ADMIN
Eric Hirano/ENG

OTHERS

Colin Lau, Deputy AG
Ted Bohlen, Deputy AG for Item F-1
Max Graham, Item K-2
Lorna Nishimitsu, Item K-1
Chipper Wichman, Item K-5
Eric Leong, Item M-3 & M-4
James Coon, Item J-3
George Playdon, Item D-14
Phil Hauret, Item D-18
Cheryl Okamura Faasler, Item D-11
Marti Townsend, Items F-5, F-6, F-8
Stephanie Fried, Item F-8, F-5

Bill Wynhoff, Deputy AG
Gregg Nelson, Item D-7
Denise Toombs, Item K-6
Bruce Laymon, Item K-1
Rory Frampton, Item K-4
Gary Yokoyama, Item J-3
Anne Kusao, Item D-17
Leolani Kini, Item D-15
Ron Kim, Item F-1
Roger Gildersleeve, Item F-1
Stewart Urten, Item F-5
Dr. Brian Bowen, Item F-5

{Note: language for deletion is [bracketed], new/added is underlined}

Chair Thielen introduced our two newest Land Board members, David Goode of Maui and John Morgan from Oahu. Also, she announced two returning Land Board members, Sam Gon and Jerry Edlao thanking all four for their service and distributed their certificates. Each division head was introduced to the new Board members.

Item A-1 June 12, 2009 Minutes

Member Gon recused himself.

Approved as submitted (Pacheco, Edlao)

Item D-7 Amend Prior Board Action of September 26, 2008 (D-7), Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd. For Walkway Stairs, Shower Station, Concrete Pier block Remnants and Landscaping Purposes, Kaanapali, Maui, TMK: (2) 4-2-2: seaward of 4, 5, 7 and 4-3-2: seaward of 26, 27, 28

Morris Atta, Land Division Administrator explained that the reason for the amendment was after discussions with the Napili Kai attorney that the area was significantly less than what it was thought to be. Subsequently, staff decided to reduce the scope to the areas fronting the Napili Kai property and this is the reason for this amendment.

Gregg Nelson representing Napili Kai Beach Resort was present to answer any questions.

Unanimously approved as submitted (Edlao, Gon)

Item K-2 First Time Extension Request Conservation District Use Permit (CDUP) KA-3399 for David M. and Linda B. Morrow Single Family Residence (SFR) at Haena, Island of Kauai, TMK: (4) 5-9-003:010 and 045

Member Ron Agor recused himself from this item.

Sam Lemmo from the Office of Conservation and Coastal Lands (OCCL) asked to approve an extension of nine months to initiate construction of the Morrow Single Family Residence subject to the conditions of the original settlement agreement.

Max Graham representing the applicants noted that typically the Morrows have a condition of one year to start and three years to complete and asked for another nine months to start, but while he is here he asked for one year to start and another year to complete. The start date would be June 26, 2010 and completion would be June 26, 2013 which should be sufficient time to complete this project.

Chair Thielen said she understands the extension of the initial start date, but asked why an extension to 2013 for completion where Mr. Graham explained to give lots of time for completion of the residence and he thought it made sense to extend the entire timeline another year. Mr. Lemmo said he understood extending the commencement date out one year and the completion date by one year, but Mr. Graham is asking for a two year completion date where Mr. Graham apologized that the correct completion date is June 27, 2012.

The Board:

Approved staff's submittal with the amended commencement date of June 26, 2010 and the completion date of June 27, 2012.

Unanimously approved as amended (Gon, Goode)

Item K-6 Conservation District Use Application (CDUA) HA-3499 for the Honotua Fiber Optic Cable System by Office des postes et telecommunications de Polynesie francaise (OPT) on State submerged land offshore of County of Hawaii's Spencer Beach Park, Kawaihae, South Kohala, Island of Hawaii, TMK: (3) 6-2-002:008

Mr. Lemmo reported on the proposal background noting that Tahiti wants to install a cable to connect to the international cable system and related those details. It was described how the applicant will diverge from the existing cable routes because those go under tide pools where excavating them would cause a great deal of disturbance and there is no capacity to put another cable in the onshore landing site where the plan is to take it along the beach with its own landing area which would require the applicant to close the beach during construction and would be coordinated with the County of Hawaii, Parks Dept. There was an EA, a FONSI issued and a public hearing was held at Spencer Beach Park with no objections. Staff supports the project and asked it be approved subject to a number of conditions.

Member Gon asked whether the adjacent National Park was present at the public hearings where Mr. Lemmo said he couldn't confirm that. Member Gon asked when and for how long initiation of this project will occur where Mr. Lemmo said that the consultant was present to answer.

Chair Thielen asked referring to the cable at the Waianae Coast landing easement whether this condition was non-exclusive and that other public utilities may access this corridor so the entry point where the other cables are now is that capacity. Do we need anything in the condition to make it clear that there maybe other cables that came in not as an exclusive easement? Mr. Lemmo said it has to do with the landing area infrastructure in creating additional capacity in terms of conduits which the applicant would have to build for any future purveyors to come on their system and referred to the consultant on the Chair's question. The Chair clarified that for the state's purposes rather than this utility is it likely there will be other requests for landing sites here and if so would you need to have a condition here to make it clear that this is not an exclusive use

where Mr. Lemmo said he doesn't think it is an exclusive use referring to Land Division and that the applicant will not be given an exclusive use of the cable route or the landing which is controlled by the county.

Member Edlao asked whether there is a limit to the number of landings in one area where Mr. Lemmo said he couldn't answer the capacity question referring to the consultant.

Denise Toombs representing Honotua Fiber Optic Cable spoke explaining that there are a couple constraints: one is if there is capacity on the land side otherwise there is no point to bring a cable in. Right now there is capacity for this cable, but she couldn't speak if there was capacity on the land side to accommodate the new cable, there might be. She knows of conduits on shore with space to put in another cable and wouldn't disturb upland. As far as the beach because there are no conduits there is no issue of capacity. Chair Thielen asked the issue is there are a series of cables coming into this beach with a particular path with the landing area of four different cables that people don't want to dig up the existing path because of the tide pools where this will chart a new path and there is the concern of eight different paths coming across the beach. Is there an ability when this cable goes in to develop capacity for any new cables that go in to be slotted into the same area? Ms. Toombs pointed out exhibit 4 and described that one manhole is at capacity and that this cable will go into the second manhole which has existing infrastructure upland from there and she thought it could fit more than one cable, but wasn't sure. The Chair said to Mr. Lemmo that her question is whether there should be something similar that went in on the Waianae project as this one goes in the capacity will be developed so if there are future applications they can all be sited there and reduce the impacts. If this is the landing site and this will be the fifth cable the trench for the first four is full and this is number five and its going into a trench to a new manhole with the capacity of three or more you want to make sure as that one is getting installed in the trench on the beach that trench is wide enough to accommodate any more in the future to minimize disturbance which is what was done with the Waianae Coast cable. Ms. Toombs said that she worked on that project and that cable had completed the capacity with this one she doesn't know if there is space for one more, but what the Chair is asking is install infrastructure and avoid trenching up the beach and they haven't proposed installing any infrastructure as part of this project. The Chair asked if she knew what the capacity is for the existing infrastructure or the number of spaces left where Ms. Toombs said she can find out. All the project activity ends at the beach manhole. Mr. Lemmo said that Ms. Toombs needs to clarify that there is no building of the conduit between the beach manhole and the waterline which is basically laying cable in the sand. Ms. Toombs confirmed that saying in order to create capacity for a new cable to come in they would have to modify the project for another applicant which is not part of their project and they are not installing a permanent conduit at all. All action is from the beach manhole to the cable station.

Chair Thielen referred back to the Waianae project asking Mr. Lemmo whether they created a whole new capacity or were they the last one to fill up the existing capacity where Ms. Toombs said they were the last applicant to fill the last slot. The Chair asked

when it was the last cable to fill the last slot the Board said you have to deal with the capacity issue. Was it the case at Waianae? Mr. Lemmo said he couldn't remember. Where the Chair said she is trying to find out what condition the Board imposed the last time. Ms. Toombs said that the AT&T cable took up the last slot explaining that she represented Telstra and who was the second to the last slot and she is not privy to the conditions to AT&T's lease.

Member Goode said there are no conduits from the water to the manhole, it's all direct burial it's a narrow branch to accommodate that so someone came in later which Ms. Toombs agreed where Member Goode said the second issue on the easement it should be non-exclusive depending on the landlord. Chair Thielen asked whether that area can fit another cable or is this the last one.

Member Pacheco referred to the Waianae case saying that when the cable came through they had to do a new path and open that up to make it larger which makes sense per the Chairperson which is not happening in this case said Member Pacheco. Ms. Toombs said it was all in the same corridor because all of these are laid under the beach and there is no conduit.

Mr. Lemmo asked who owns the existing manhole where Ms. Toombs replied saying Keona Pacific Life. Mr. Lemmo said they are an existing company, lay cable in the sand and will use the existing PLNI beach manhole. He didn't think anyone is excluded in the future from using the sand channel and using the beach to get access to either GTE's or PLNI's facilities. Chair Thielen asked your saying this other one that owns PLNI manhole is also coming in the same route where Mr. Lemmo said they are already there asking maybe Ms. Toombs could explain why there is a beach manhole here, but he doesn't see a cable site going to it where Ms. Toombs said it is existing.

Member Edlao expressed his concern that the Board has no jurisdiction over the manholes that nothing will stop others from coming in to build more manholes where Ms. Toombs said it is the county's jurisdiction and that each independent project would have to apply which the Chair said that the manhole can go in depending on the land owner, but any future cable would have to come before the Board that these cables need to go in one area without digging up the beach every time. Ms. Toombs said there is capacity on land and when they are here there is an upland constraint. The Chair reiterated her question on what the Board did in the past whether the last one in that fills the capacity has to increase the capacity or the next person coming in has to build a house where Mr. Lemmo said that was not the case in the Waianae project. Ms. Toombs retold how there was two systems coming in simultaneously and the two schedules were coordinated and no one built any additional infrastructure.

Member Gon mentioned the standard clause on initiation within one year and completion within three years asking whether it will take three years where Ms. Toombs said the actual installation takes 10 days and the cable on the beach takes about a day. Member Gon said that he presumed that the beach will close for a day or two which is one day per Ms. Toombs explaining the process. Member Gon asked whether Ms. Toombs will be

working with the county on the date which she will. Member Gon also suggested that Ms. Toombs contact the adjacent National Park Service since that beach provides one of the traditional ocean access points for practitioners at that site and if Ms. Toombs chooses a day when the practitioners need to go into the ocean it would be bad which Ms. Toombs acknowledged in agreement.

Unanimously approved as submitted (Pacheco, Goode)

**Item K-1 Conservation District Enforcement File KA 09-12 Regarding
Unauthorized Clearing by Paradise Ranch, LLC at Lepeuli, Hanalei,
Kauai, TMK: (4) 5-1-003:003**

Mr. Lemmo briefed the Board on the history background noting that the work wasn't authorized which was a violation of State rules that the Lessee should have contacted staff before doing any work and staff does not condone this type of activity at all. There is a Natural Resources Conservation Plan in place to improve the habitat, listed a number of problems, trees targeted are non-native, clearing using hand saws, and removal by a tractor. Staff could have fined the maximum of \$15,000, but due to mitigating circumstances staff decided to make a smaller fine of \$2,000 imposing an administrative fee of \$500 for a total of \$2,500 payable within 60 days should the Board make a decision on it. Failure to pay this fine would result in a fine of \$15,000/day until the order is complied with.

Member Agor asked whether there was any discussion with the Lessee about when they established the path of the fence line with the county would there be any benefit to the public in what they are doing to the fence line to the beach where Mr. Lemmo responded saying no they haven't that the Lessee needs to speak to OCCL staff before they do it. Staff wants to clear the violation proceeding which allows the Lessee to come to OCCL to apply for perspective uses like additional land maintenance activities, fencing, etc. and they can have that discussion at that time. Member Agor said he is fine with the minimum assessed fine if the public can benefit from it. The Chair clarified if the Lessee has plans for that area they will have to come back in the future for a separate permit which Mr. Lemmo acknowledged.

Member Goode asked whether NRCS talks about compliance with their permit where Mr. Lemmo said he hasn't spoken to them. Member Gon asked how many cooperative projects there are with NRCS and the state on areas like this. Mr. Lemmo explained that the NRCS services mostly private landowners who want to institute conservation practices on their land. The benefit of doing a NRCS plan is it provides an exemption from the grading ordinance which is a way to streamline land management activities and to get good conservation practices in return. Member Gon asked that the main problem here is the Lessee initiated their plan without getting the proper clearances for the conservation district which Mr. Lemmo confirmed.

Lorna Nishimitsu introduced herself and was accompanied by Bruce Laymon who is a member of Paradise Ranch, LLC is a rancher and landscaper on the Island of Kauai.

They agreed with staff's submittal and have no dispute with it; however, they asked the Board to waive an imposition of a fine where Mr. Laymon will explain the circumstances. There was a letter from the Kauai Branch of the Sierra Club which Ms. Nishimistu finds disingenuous distributing documents from the East Kauai Solar Water Conservation entity and copies of correspondence from the Department of Public Works of the County of Kauai regarding the 2002 and 2003 incident of grading violations. Ms. Nishimitsu explained that Mr. Laymon is a rancher and landscaper and is not a sophisticated developer as the Sierra Club would like to have the Board believe. Mr. Laymon is familiar with getting NCRS clearances for his ranching operations throughout the island and these have exempted him from getting grading and grubbing permits from the County of Kauai. Before Mr. Laymon commenced work on this leg of lease land at Lepeuli he had started up mauka implementing his NRCS plan down makai. The last section Mr. Laymon needed to fence to keep his cattle from entering onto the beach he consulted with a staff member at the Planning Department and staff at the State Historic Preservation Division (SHPD) because Mr. Laymon was aware that there were burials in the area to show those departments what his proposal was for the area – putting in fencing replacing the old dilapidated Meadow Gold fence, getting rid of old dead trees that had fallen over the service roads or where he needed to reinstall the fencing. Everybody said that is a good plan and to go ahead with it, but without cautioning Mr. Laymon that he might need an SMA or a CDUP before commencing this work. Mr. Laymon continued implementing this plan and it was ironic that on the first day of the complaint alleging that he had a bulldozer out there, which was never confirmed and Mr. Laymon didn't, was the day he was there to start the work and he tried to move some squatters off of the property because there has been a history of people squatting on the property starting fires and having to call in the fire department and all these incidences where there was one confrontation between one of his workers and one of the people near the beach which was when the complaint went in about bulldozing. Ms. Nishimitsu suggested considering the source of the information or the allegations about Mr. Laymon's conduct and after he testifies the Board will find that he is not the type of person who would deliberately flaunt rules and regulations of the county or the state especially because there are so many people down there who would be observing Mr. Laymon's activities and would be prone to report him because these people don't want their privacy on someone else's property disturbed and their use of the beach area witnessed by outside people. Mr. Laymon can explain. It's understood that public nudity may not be illegal, but there are other people, besides those people who want to walk around naked using the beach and it will cause confrontations between beach goers about what kind of activities are occurring.

Bruce Laymon spoke relating his family history and business on Kauai. He is an avid fisherman who loves Kauai and the community and is well aware of conservation and keeping things nice. He is a member of the Cattleman's Association, Kauai Chapter who was nominated as vice-president and during state meetings members were encouraged to take advantage of soil conservation services that were made available and a lot of people think it's a short cut to doing things which makes it easier, but they have the expertise to set you on the path to be a good steward of your property. As Vice President Mr. Laymon had to inform everyone and encourage them to use them where Mr. Laymon

started his plan which was when the first complaints came in. They met with the Soil Conservation Board because of articles that came out saying Mr. Laymon was doing illegal work which surprised him because they had a soil conservation plan that was approved and in place. The Soil Conservation Board cleared Mr. Laymon's company of any violations because they had notified everyone and even the state having contacted Nancy McMahon of SHPD. Also, even though Paradise Ranch was exempt whenever they did any grading or grubbing they would notify the public works because they knew complaints would come in. Staff says that Paradise Ranch jumped the gun, but this plan has been in place since 2003 where they had done 90% already and they knew this was a sensitive area where the Soil Conservation people asked Mr. Laymon to be involved with the reef protection practices. The Monk Seal Trust asked him to be a part of their monk seal protection which he agreed to do. Now his friends who fish and dive are upset with him because there are seals all over the place. In the past month there have been complaints of cattle and horses going down in this area where he explained to the director the urgency of putting that fence up was two fold because Mr. Laymon was participating in this and wanted the fence up to prevent his cattle and horses plus there is 150 acres he wasn't able to use now because he can't put a fence up.

Chair Thielen said this plan covers a large area of agriculture lands and have been working for several years now. And we are covering the entry down in the conservation land portion which Mr. Laymon confirmed.

Member Agor asked whether Mr. Laymon was working with the planners which Mr. Laymon confirmed saying that he recommended inserting no grubbing and grading in that area and to do it by hand. The allegations about big trees being cut, there were two dead trees were stumped and both was targeted for removal because they were rotten and the people complaining took pictures of the stump saying they were cutting big trees.

Member Agor asked whether they in the process of relocating the fence line where Mr. Laymon said it is already there, but now with all the coastal laws his company met with the Planning Department where they came to an agreement that they would move it back even further so there is a bigger buffer which ties in the reef protection, recreational and preservation. Member Agor asked when the fence is put up would the land area from the fence to the beach will Mr. Laymon doing anything there to benefit the community which Mr. Laymon said if he had his choice his heart would say yes, but his pocketbook says no because he doesn't get any benefit from it, but because of the Soil Conservation Plan that he had agreed to they have some cost sharing items that they will give you so much per acre to continue that practice. He is not making any money, but it does help with some of the costs. Because of the legal camping, squatting and other things going down there it would be a great benefit plus the public acknowledged that they are going to make this like a park and it will be beautiful. When his company started cleaning they took out five truck loads of household rubbish when they were first confronted by the naked people throwing the rubbish back into the bushes saying that Mr. Laymon's workers are violating their privacy there and that is the kind of challenges they have there.

Member Agor said that the reason he asked was because he has seen the results of Mr. Laymon's workers clearing the brush and having a clear visibility from the proposed fence line to the beach which Member Agor approves of and is a benefit to the public which Mr. Laymon said he was really excited about doing that, but feels bad that he is before the Board now that there was no intention to break any laws and this is a good thing for this area. He had to go into the trust to increase the lease from 25 to 30 years because the mission statement for this trust says to keep this land in open space for pasturage and the trust was so encouraged by this plan that Paradise Ranch had in place that they increased the lease to take advantage of more opportunities to participate in cost sharing things that was available to Paradise Ranch.

Member Goode asked how much area will be lost if they move the fence line mauka which Mr. Laymon said about 5 to 10 acres, but traditionally coastal lands are not very good pasture areas. Now it will be a beautiful park where the public can enjoy and not feel threatened. The turtles, albatrosses and the monk seals are back and having the fence line was Mr. Laymon's greatest urgency, but when his men found these camp sites and people coming threatening them and saying they shouldn't be here wasn't a pleasant thing to deal with.

Member Edlao asked it was mentioned earlier to reduce the fines which Mr. Laymon replied saying that he had spent quite a bit of money having to hire an attorney and spent \$5,000 in surveying that the county encouraged to do so that they knew where everything was, but Mr. Laymon feels it benefits the community and its important and if he is fined he will pay it.

Member Goode said he appreciates Mr. Laymon coming to explain the situation suggesting reducing the fine to the \$500 administrative fee because Mr. Laymon's men were in a conservation district that they weren't suppose be in and Mr. Laymon knows that now and moving the fence mauka would benefit the public and would support that.

Member Edlao said that there are rules and regulations and there are violations without penalties then the rules are just recommendations, but appreciates Mr. Laymon coming over from Kauai to explain all this which benefits everyone and would go with the \$500 administrative fine because costs were incurred by the Department.

Member Gon pointed out in addition to the benefits to the public that there are clear benefits to the natural resources that the Board tries protect here and agrees to the modified fine.

Chair Thielen agreed with what the fellow Board members had said, but one of the reasons she would consider waiving the fine is that you're looking at a plan for a very large area and only a portion of it was down in the conservation district and you have worked on it for a series of years. Mr. Laymon and his attorney mentioned because they had gotten this other permit they thought they had covered all the basis. In that 2002 approval from the East Kauai Council of Soil Water Conservation District it says this plan does not preclude any Kauai County, State, and Federal Ordinances or Regulations.

Additional requirements may need to be met before you begin agricultural activities now or in the future. It is your responsibility to obtain any permits required by County, State and Federal agencies. It is important to understand even if it is annoying to go to how many agencies to get permits to do activities they try to put into permits warnings that this is not the final one. But, she understands that Mr. Laymon deals primarily with agriculture lands, your pretty mauka and you think you've got your basis covered, but a good rule of thumb is any time you came down near the ocean you'll be in the conservation district and special management area like he pointed out. Mr. Laymon talked about the fences and the Chair asked whether he understands what the administrator is saying is that is separate from the hearing today and whatever the Board decides today they are not approving the fence and if it is in the conservation district Mr. Laymon has to come back before he starts any work which Mr. Laymon understood saying that the monk seal people are asking when is he putting the fence back in and he wants to do this as quickly as possible and they are not doing any work down there trying to keep the cattle away from there, over the last several months he is losing 150 acres of pasture land, but he can't stop the people from opening his gates who live there and he doesn't have interior locks on all his gates assuming that its private property that he wouldn't have to put 30 to 40 locks on all his gates.

Ms. Nishimitsu noted that they do have a draft which they will be delivering to staff which is a separate matter.

Member Agor moved to accept staff's recommendation with a couple amendments, omission of item #1 which is the fine of \$2,000. Member Goode seconded it.

The Chair summarized that the Board motioned to accept staff's recommendation with an amendment to eliminate the \$2,000 fine, but to keep the \$500 administrative cost.

Member Agor asked Mr. Laymon and Ms. Nishimitsu to work with OCCL staff.

Unanimously approved as submitted (Pacheco, Edlao)

**Item K-5 After-the-Fact (ATF) Conservation District Use Application (CDUA)
OA-3507 for CRM Erosion Control Wall and Slope Stabilization for
Charles Wichman at 123 Kalaipua Place, Tantalus, Island of Oahu,
TMK: (1) 2-5-014:012**

Mr. Lemmo briefed the board saying that the applicant built the wall prior to anyone approving it where staff took the case through the administrative penalties system because they felt it was relatively minor in nature and looking at the mitigating circumstances. The land owner paid a fine of \$600 and staff instructed upon payment of that fine to apply for an after-the-fact permit which is what they have done and that is what is before the Board today. The CDUP is to replace the existing and authorized wall with a new wall to stabilize the slope, to protect the driveway and the county road below. The land owner has a wall that probably was not engineered correctly and will replace it with one that is. People have weighed in on the proposed engineer design of the wall

including the City and County of Honolulu and the applicant agreed to comply with all engineering requirements of the city. Staff did process a draft environmental assessment which was published in the September 2008 Environmental Notice. Everything looks in order on this after-the-fact request where Mr. Lemmo asked the Board's approval for the proposed project subject to the standard conditions and the applicant was here to testify.

Member Gon asked that the fine for the violation was dealt with and only the after-the-fact permit before the Board which Mr. Lemmo confirmed.

Member Edlao asked about the conditions of the wall where Chipper Wichman son of Charles Wichman came up to testify saying he is helping his father with the proper permits. His father was caught in a situation where a tree fell down, the feral pigs were rooting, the dirt was falling down and was approached by a Tongan contractor who said he had a license and would build the wall properly. It's a good wall, but this contractor did not build it to county code where the City & County said it would have to come down and be re-engineered. 2005 was when the tree fell and the problem with the pigs then in 2006 was all the rain where the dirt was going on the county road where his dad was trying to keep open so that his neighbors had access. Mr. Wichman and his dad wanted to do the right thing and worked with the county to come up with a plan that wasn't ugly because the county wanted to cement the whole slope. The county and the Wichmans came up with a plan with a nicely vegetated slope approved by the county. The county won't touch it until Board approval and once approved the Wichmans will go back to the county for the proper permits. Chipper Wichman complimented Mr. Lemmo, Dawn Hegger and all the work the Department does.

Unanimously approved as submitted (Pacheco, Gon)

Item K-3 Second Time Extension Request for After the Fact Conservation District Use Permit (CDUP) MA-3439 for the Wailuku Country Estates Water Storage Tank with Associated Improvements and Subdivision of Land by Wahi Ho'omalua Limited Partnership at Wailuku, Island of Maui, portion of (2) 3-3-002:001

Mr. Lemmo asked to withdraw this item because it was not necessary and the applicants were notified.

No one from the public was here to testify.

Member Gon made a motion to accept staff's recommendation to withdraw Item K-3 and Member Agor seconded it. All approved.

Withdrawn (Gon, Agor)

Item K-4 Conservation District Use Application (CDUA) MA-3498 for a Single Family Residence (SFR) and Related Improvements by Warren and Susan Dean and James and Jeanne Riley at Olowalu, Lahaina, Island of Maui, TMK: (2)4-8-003045

Mr. Lemmo reported on item background where this area is subject to a number of coastal hazards – flooding, erosion, tsunami, etc. Originally the landowner was going to do this slab on grade structure, but staff asked them to put it on post and pier to get the structure above the base flood of eight feet and they complied. It's easier to move a house this way rather than slab on grade which is something staff is promoting for coastal mitigation. The landowners sited the house 91 feet from the shoreline which is as far back as possible as well as their leach field. Ground water and flooding were cited as potential problems with the wastewater system which the landowners tried to mitigate. The area is developing into a rural residential type area which is consistent with that type of use. The applicant has addressed all issues, there was an environmental assessment process, a fonsi was issued and based on the performance of the applicant staff recommends approval of the single family residence subject to the standard conditions.

Rory Frampton representing Jim Riley thanked staff that the report is complete and accurate, but clarified that the base flood elevation is five feet noting that a recent hurricane study completed in 2009 that suggested that the base flood elevation should be raised to eight feet which is not a requirement now, but is a suggestion in the future. The applicants raised it to eight feet to adopt that new study. Also, thanked staff for educating and assisting his clients.

Unanimously approved as submitted (Edlao, Pacheco)

Item E-7 Consent to Assign General Lease No. SP-135, David Pratt, Dudley Pratt, Jean Wolff, Joan Pratt and Norman Wolff, Assignor, to Samuel W. Pratt, William D. Pratt, Melinda L.P. Walker, Charles D. Pratt III, Timothy G. Pratt, Sarah P. Quinn, Assignee

Dan Quinn with Division of State Parks reported that this is a request to consent to assign noting that he has no relation to Sarah P. Quinn informing the Board that this is one of the leases renewed to the recreational residences up in Koke'e where the law required staff to renew to the existing Lessees where there are a number of people who want to assign to the next generation so that there is no problems in the future since this is a 20 year lease and staff recommends approval.

Chair Thielen asked whether Mr. Quinn could confirm the lease terms are authorized assignments which Mr. Quinn confirmed.

The attorney for David Pratt was present.

Unanimously approved as submitted (Agor, Gon)

- Item M-3 Issuance of Direct Lease to Liquid Robotics, Inc.; Situated at Pier 1 North Shed and Adjacent Open, Paved Area, Kawaihae Harbor, Kawaihae 1st, South Kohala, Island of Hawaii; Tax Map Key: 3rd Division, 6-1-03: Portion of 23**
- Item M-4 Withdrawal and Termination of Harbor Lease No. H-99-1, dated April 1, 1999, Issued to Honolulu Agency, Inc. and Oceanic Global Trading at Pier 32, Honolulu Harbor, Kaholaloa and Iwilei, Honolulu, Oahu**

Eric Leong representing Department of Transportation, Harbors was present to answer any questions.

Unanimously approved as submitted (Pacheco, Edlao)

- Item M-1 Consent to Assignment of Lease No. DOT-A-95-0023 Robinson Charitable Remainder Unitrust Agreement to the John Robinson Foundation, Honolulu International Airport**
- Item M-2 Consent to Sublease - Lease No. DOT-A-99-0005 United Airlines, Inc. to Gate Gourmet, Inc. Honolulu International Airport**

Unanimously approved as submitted (Pacheco, Goode)

- Item J-3 Request for a Petition to Adopt and Amend Hawaii Administrative Rules by the Hulopo'e Beach Park Council, Manele, Lanai.**

Ed Underwood for Division of Boating and Ocean Recreation explained that staff received a petition from the Hulopo'e Beach Park Council from Island of Lanai to amend Hawaii Administrative Rules as they relate to commercial boating as well as the issuance of those commercial permits. At this time, Boating does not recommend moving forward with the proposed amendments and staff has talked to representatives of the Hulopo'e Beach Park Council who are present. Staff understood the communities' concerns with the amount of activity that takes place on the public beach area, but is unsure how they can tie in the boating rules to regulate the private beach park area. Staff is willing to work with the community on that, but the way the rules are written right now they would not support this.

Gary Yokoyama with Castle and Cook testified saying they are a member of the Hulopo'e Beach Park Council which is a community based adhoc committee formed when the hotels were being built to supervise and express concerns on the use of Hulopo'e Beach Park. The council filed the petition to amend the rules at the suggestion of the Department and we're hoping to hear from staff regarding the concerns they may have as to the appropriateness of their proposed revision, but never took place and

requested the Board's consideration be deferred for a month so that they may return to staff to work out any concerns they may have.

James Coons said that his council has tentatively scheduled a meeting with staff the first week of August where it's possible that they could have everything worked out by the next Board meeting. Chair Thielen warned that the next Board meeting agenda is full and it's better to not set a time which was fine with Mr. Yokoyama.

Chair Thielen said after reading over this that there was a request to have a restriction to make sure that people who are having a permitted ability to bring a commercial operation into the small boat harbor, a restriction that they comply with certain requirements in other areas and we believe we have the authority under our permits to require people to comply with county, state and federal ordinances. As far as our ability to require people to comply with something on private land the Chair didn't know if the Department had that ability that is something the private landowner would have the control on the access and the abilities which is one of the things the council will be talking over with staff. There may be an ability to limit access during certain periods which has been done in Kaneohe Bay where there is no commercial activities on Sundays which is anything coming into the small boat harbor not related to other areas and that may impact other operations. It's some guidance for the council's conversation with staff.

Member Edlao moved to defer where Member Goode seconded it and the Board approved.

Deferred (Edlao, Goode)

Item J-1 Approval for the Award of Contract - IFB 09-004-06, for the Purchase of Buoy Components and Related Buoy Mooring Components

Mr. Underwood said that staff would like to add to the recommendation that it is subject to the review and approval of the Attorney General's Office.

Unanimously approved as amended (Goode, Gon)

The Board approved staff's amended recommendation by adding that it is subject to the review and approval of the Attorney General's Office.

Item J-2 Request for Approval to Initiate Rule-Making Proceedings to Amend Hawaii Administrative Rules, Section 13-231-26, Relating to Principal Habitation Permits, to Allow a Personal Partner to Reside on Vessels at the Ala Wai and Keehi Small Boat Harbors (See Exhibit A); Possible Executive Session Pursuant to HRS § 92-5(a)(4).

Written testimony was received and distributed.

Mr. Underwood informed the Board that staff was contacted by the American Civil Liberties Union regarding the same sex issue as they pertain to live aboards in the small

boat harbors, primarily Keehi and Ala Wai. The petition is to amend to allow one personal partner because right now it is the owner of the vessel or their spouse or their children and staff did not take issue with that and is in favor to amend it. The Chair noted that the Board had received written testimony from the ACLU.

Unanimously approved as submitted (Edlao, Pacheco)

**Item D-17 Amend Prior Board Action of September 28, 2007, Item D-3;
Approval in Principal of Direct Lease to Honolulu Community Action
Program for Preschool and Related Programs Purposes, Kunia,
Oahu, TMK: (1) 9-2-005:012.**

Administrator for Land Division, Morris Atta explained that the former property was Kunia School. As part of the approval the Board required Honolulu Community Action Program (HCAP) to seek compliance with Chapter 343 and also obtain the State Special Use Permit Zoning Entitlements. The Board submission initially was trying to satisfy the Chapter 343 requirement by seeking concurrence on staff's recommendation that the use being sought by HCAP did not require an EA or EIS because it met one of our exemptions. Subsequent to preparing the recommendation staff did receive a letter from the applicant requesting additional time to comply with the entitlement portion and staff was in agreement to that request. The request is to extend that compliance period until October 2011 which staff recommended adding a third recommendation that allows for that extension period for compliance. There was a typographical correction to "improvement in principal" which should be "principle" throughout the submittal.

Anne Kusao representing Kunia Head Start Preschool was here to answer any questions.

Member Gon asked do you find the recommendations including the proposed amendment as a two year-extension which Ms. Kusao confirmed and that they had prepared an environmental impact statement.

A motion was made by Member Gon to approve as amended and Member Agor seconded it which the Board approved.

The Board:

Approved staff's submittal with the following amendment: Correct spelling error throughout the submittal – Principal should be Principle. Added a Recommendation 2. Extending the period for the applicant to obtain a State Special Use Permit and Zoning (Use) Permit until October 2011. Change the numbering of Recommendation 2 to be Recommendation 3.

Unanimously approved as amended (Gon, Agor)

Item D-14 Grant of Term, Non-Exclusive Easement to George W. Playdon Jr. for Seawall Purposes; Mutual Cancellation of Grant of Non-Exclusive Easement S-5195, Kaluanui, Koolauloa, Oahu, TMK: (1) 5-3-008:seaward of 008.

Mr. Atta made the Board aware that this is an existing easement in place which was based on staff's prior practice of requiring periodic re-openings on the composition for the easement. The current practice is to issue a long term easement for these types of structures and require a one time payment because it's less expensive than going out and getting appraisals. When this older easement came up for the re-opening both parties as well as staff felt that it was more appropriate to cancel the existing old easement and re-issue a long term single payment easement and that is what this request is.

George Playdon spoke saying he was here to answer any questions and noted that he has been renting these walls for 20 years.

Unanimously approved as submitted (Agor, Morgan)

Item D-15 Sale of Remnant to Hawaii Conference Foundation, Hauula, Koolauloa, Oahu, TMK: (1) 5-4-005:013.

Mr. Atta reported that there is a parcel that was a former railroad site adjacent to a larger area owned by the Hawaii Conference Foundation and is run as a campsite. That parcel that staff is seeking to sell as a remnant is the sole access point for that campgrounds and under the remnant statute staff could determine that parcel is in fact a remnant that staff was authorized and could negotiate a sale directly with the landowner which is what staff is requesting under this submittal. The Attorney General's Office did have a concern with how staff characterized the site as a remnant which went back and forth on whether or not it was an appropriate characterization because it is currently used as a road way leading to the campsite. Staff ran through the analysis and determined that it met the general criteria for a remnant namely being that it is unsuitable and undevelopable as a single unit and that it would be appropriate for staff to designate it as a remnant and staff seeks the Board's concurrence on that it is in fact a remnant and that staff be authorized and go forward to sell that remnant.

Chair Thielen asked whether the law that just passed on the sale of public lands it excludes remnant parcels where Mr. Atta confirmed from the legislative approval process.

There was some discussion regarding the property on the exhibits.

Member Goode asked whether there are any adjoining landowners or interests to the remnants where Mr. Atta said the two adjoining landowners is the state. One looks like a remnant parcel which staff was evaluating for a possible sale another adjoining landowner. The other is a 999 year homestead lease which the state owns, but is not

covered by that lease and staff has done the analysis for the various uses of these parcels and came up with as a single unit is not suitable or desirable for development.

Board member Goode asked about the access which Mr. Atta said that only this one parcel that staff is selling has that access issue.

Leolani Kini representing Hawaii Conference Foundation was here to answer any questions.

Chair Thielen asked why the sale of a remnant versus a non-exclusive easement where Barry Cheung, Oahu District Manager for Land Division spoke saying that for this particular strip of land if staff issues a perpetual non-exclusive easement it would still make the rest of the state's interest undevelopable because staff would be subject to the perpetual easement and couldn't do anything with it on the land where the Chair said the state would retain liability which Mr. Cheung acknowledged.

Member Gon asked whether this is considered ceded land sale. Chair Thielen said that the law that passed specifically exempts remnant sales of remnant parcels from having to go through that approval process, but asked is this ceded land where Mr. Atta said it is. The Chair said for your information the proceeds from the sale of remnants go to the general fund which Mr. Atta confirmed saying that 20% goes to Office of Hawaiian Affairs (OHA).

Member Pacheco asked this is the first time he recalls declaring a remnant what does the law spell out that defines a remnant where Mr. Atta said the statute reads it defines a remnant as being ...

Chair Thielen said this definition of remnant has been on the books for many years. It's not just in this current legislation that passed its referring back to a lot of the land purposes was set many years ago. Member Gon said that is good clarification because if it meets the pre-existing definitions for remnants then it won't be something that won't be problematic for the Board afterwards.

Mr. Atta said the law defines a remnant as a parcel of land economically or physically unsuitable or undesirable for development for utilization as a separate unit by reason of location, size, shape or other characteristics and it gives examples of what a remnant could be.

Member Gon said he thinks several of the Board members have been duly sensitized to the idea of sales of ceded lands.

Member Pacheco moved to approve where Member Goode seconded it all approved.

Unanimously approved as submitted (Pacheco, Goode)

- Item D-3** Grant of Perpetual, Non-Exclusive Utility Easement to Hawaii Electric Light Company, Inc.; Issuance of Construction Right-of-Entry for Installation of 5-Way Vacuum Switch at Waiakea, South Hilo, Hawaii, TMK: (3) 2-2-014: portion of 72.
- Item D-16** Grant of Perpetual, Non-Exclusive Easement to Hawaiian Electric Company, Inc. and Hawaiian Telcom, Inc. for Utility Purposes; Wilikina Drive, Wahiawa, Oahu; TMK: (1) 7-3-012:011 and 015; (1) 7-3-013: 008 and 009.
- Item D-18** Grant of Perpetual Non-Exclusive Easement to Hawaiian Electric Company, Inc. for Utility Purposes; Issuance of Construction and Management Right-of-Entry; Waipio, Ewa, Oahu; TMK: (1) 9-5-048:052 portion.

Mr. Atta said Items D-3, D-16 and D-18 are HECO non-exclusive easements for various reasons and noted an additional right-of-entry for HECO to start work and manage the area.

Phil Hauret representing HECO was here to answer any questions.

Member Agor moved. Member Gon seconded it. All approved.

Unanimously approved as submitted (Agor, Gon)

- Item D-11** Grant of Term, Non-Exclusive Easement to Marilyn CupChoy Trust for Boat Dock Purposes, Kaneohe, Koolaupoko, Oahu, TMK: (1) 4-6-003:seaward of 077.

Mr. Atta explained that the property transaction was started by the former owner who was the mother of the current applicant, who initiated the process to comply by the amnesty program for docks in Kaneohe Bay, but never completed it before passing away. The daughter was in the process of selling the property, and wanted to complete the legitimization of the dock, but because the program is no longer in effect staff had to go through the regular request process. Through the mother's prior efforts the daughter was able to get OCCL permits. There are no outstanding CDUP violations or fines, and the current request allows the current owner to get an easement through the Department's easement process.

Chair Thielen asked Mr. Atta to explain the text regarding OCCL and remarks related to the amnesty program where Mr. Atta said ordinarily under the amnesty program and even under regular easement requests for submerged lands, staff requires that OCCL give an analysis to see whether a CDUP is required for the structure. When the mother was working on the amnesty process she was in touch with OCCL to get all the appropriate documentation to show that she qualified to get an easement through the program and that she had the proper documentation which is as far as she got. With that same

documentation and concurrence by OCCL indicating that they had no objections to an issuance of an easement for this particular structure staff went ahead and processed this easement request as a regular shoreline easement request. The Chair pointed out that is not what the text says on page 3. It looks as if OCCL recommends rejecting this. Mr. Cheung came up and explained that because the owner Mary CupChoy was trying to fix the pier she approached OCCL to get a permit, but OCCL found a permit was approved a long time ago and one of the conditions of the permit was Ms. CupChoy needed to get a land disposition from the Land Board which means a lease, permit, or easement before she can actually fix the pier. OCCL is not objecting to the issuance of the disposition, but would rather have Ms. CupChoy get a disposition from the Board before she can conduct any repair work. The Chair asked if this refers back to the 1979 permit which Mr. Cheung confirmed. But the Chair said those permits expired and that the Department just went through this with a Kauai matter because all the conservation district use permits have a term limit and may expire by a certain term. Apologizing for not catching this sooner Mr. Cheung noted a few years ago when staff did the CDUP for the Kaneohe Bay Pier amnesty program he doesn't recall placing a time limit and would have to check, but this subject location is under two CDUPs. If the 1979 permit has an expiration date Mr. Cheung apologized for missing it, but the approved master CDUP from July 2001 for the pier program does not have an expiration date. This decision could be subject to the master CDUP assuming that 1979 doesn't have an expiration date. Chair Thielen summarized that if Ms. CupChoy can get an easement she could come under the master CDUP which was Mr. Cheung's understanding.

Cheryl Okamura Faasler representing Marilyn CupChoy was here to answer questions.

Mr. Cheung said that staff has to come back to get OCCL's approval and Mr. Cheung will talk to Mr. Lemmo right after this meeting.

Board member Gon asked the Board what the best way was to incorporate this circumstance into the existing recommendation. Mr. Atta said we could add it to the recommendation that subject... Member Gon said it was recommendation #2 and read it.

Member Gon made a motion to accept staff's recommendation which was seconded by Member Morgan and Board approved.

Unanimously approved as submitted (Gon, Morgan)

10:55 AM RECESS

11:20 AM RECONVENED

Item F-1 Resubmittal and Settlement Offer for Consideration - Enforcement Action against Makena Boat Partners for Breaking and Damaging Stony Coral in Makena Bay, Maui

Dan Polhemus introduced himself as the Administrator to Division of Aquatic Resources (DAR) spoke by reading the submittal summary saying that staff considers this settlement sufficient to compensate for the resource damage occurred and recommends approval. Deputy Attorney General Bill Wynhoff was present and Mr. Polhemus deferred to him for further explanation.

Bill Wynhoff pointed out that this is the first time that staff has settled a contested case and it's fair to that staff is very mindful that this is ultimately the Board's call so staff presenting a settlement is by not any means intended to take away from the Board's discretion as the body that makes these calls. On the other hand it does seem that it would be appropriate use in certain situations to settle matters of this type when a favorable settlement is possible. This is a settlement that staff thought about with quite a bit of care and they do think it is one that is very fair. There was some discussion about the nature of the resources that were involved – the size of the coral and amount of coral. Mr. Wynhoff and Mr. Polhemus spoke to Russell Sparks who was the biologist on the scene and he thought this was fair. Mr. Wynhoff spoke to Steve Maderass who first originally reported this back in July 2007 and Mr. Maderass impressed everybody as someone who is public spirited where it was pilikia for him to report this and it was great that he did where staff talked to him and he thought it seemed fair and that staff wanted to present to the Board. The Chair because she is acting as quasi-judicial capacity Mr. Wynhoff did not have the opportunity to discuss this. Mr. Wynhoff personally thinks this is a real opportunity and a good settlement, but we all recognize it's the Board's call because it's a unique situation. Mr. Wynhoff represents the Department noting that there is a divide between the Department and the Board where the Board's attorney, Ted Bolin is also here. Because it is quasi-judicial the Board is entitled to talk amongst your selves privately as well, but there isn't any reason why they can't talk to the Board publicly and the responding party is here with their attorney as well and they would be happy to answer any questions.

Chair Thielen asked Mr. Wynhoff to explain why an attorney for the Department and an attorney for the Board where Mr. Wynhoff explained that typically the state is the state, but there are some exceptions to that and in particular when we are in contested case mode. The history of this and contested cases in general comes to the Board by way of a staff presentation at an open Chapter 92 Sunshine meeting. The staff presents information the Board makes a preliminary decision on what it wants to do. In this case the respondent asked for and is entitled to a contested case hearing. Pursuant to statute that then puts the Board in a quasi-judicial role where the seven of you are acting as both the judge and the jury because it is a non-jury trial or resolution you then become entitled to talk amongst yourselves. It's the exact opposite of your Sunshine Law because you are entitled to talk amongst yourselves, but are disenabled to talking individually with members of the public and that includes the Department because the Department is like the prosecutor like a prosecuting attorney if you want to analogize it to that and the Board is the judge. How they would handle it is to have separate deputy attorney generals representing the Department and the Board where Mr. Wynhoff represents the Department and Ted Bohlen is from another division of the Attorney General's Office

and is supervised by a different supervisor so it's kind of what they used to call a Chinese wall situation.

The Chair said coincidentally there was another meeting earlier where the Board met in its quasi-judicial role to discuss a separate contested case hearing which she did not participate in because in that particular matter she had become involved in the settlement discussions and therefore had to recuse herself from the decision made by the Board. In this case the first deputy (AG) took the lead in the discussions on the settlement where the Chairperson is still sitting on the Board and is brought to her the same way as the Board. The Chair wanted to explain this to some of the new Board members and they can understand this agenda item and what they had met on earlier today. Chair Thielen asked just for clarification in the discussions on the settlement was the counsel for the Board participating in that or not where Mr. Bohlen said he did not participate. So Board members we've received a recommendation from staff and the Department on a settlement on a matter that was in a contested case hearing if anyone feels the need to go into executive session to have some discussion with our council to receive legal advice we can do so and adjourn for executive session. We also have the option to have that discussion in the open if you like.

Member Edlao requested to go into executive session to consult with the Board's attorney on the Board's rights, duties, privileges, immunities and liabilities. Member Goode seconded it.

11:18 AM EXECUTIVE SESSION

11:58 AM RECONVENED

Ron Kim introduced himself as the attorney representing Makena Boat Partners and with him was Roger Gildersleeve from Maalaea Boat Sails and Charters, Inc. one of the principles of Makena Boat Partners. Mr. Kim said that they have nothing to add to the Board's recommendations expressing remorse that any natural resources damaged and they look forward to their relationship in the future hoping to work with the Department to protect, preserve and nurture their resources.

Member Edlao said looking at this was not exactly what he had expected expressing his disappointment saying to him you have rules and regulations and then you have violations without meaningful penalties in the rules and regulations are just recommendations as far as he is concerned. In this particular one he was not satisfied with the analysis on how you guys came up with this figure and he felt it should be more specific in terms of how you guys came up with this figure as a Department because it makes quite a bit of difference that he just needs some explanation on how you guys came up with this particular one what was taken into consideration. Obviously the damages, but there was also some negligence involved in this that Member Edlao needs more specific analysis of how this figures was derived.

Mr. Wynhoff said he'll be happy to respond to that if the Chair wanted, but understands we're in Board discussion where the Chair said to go ahead. Mr. Wynhoff explained that this ties in with the next item, but to go back a bit, these coral damages issues are important, big and have gotten a lot of attention and are kind of new. He wasn't sure if Member Agor was on the Board when Pila'a was destroyed and they went through a lot of effort struggling with that unfortunate incident. The question was what rules covered it because it was sedimentation so that was an unusual type of thing that was difficult to get under the rules. Then the question was how are you going to value it? So we went through a lot of thought and analysis on that one. More recently Mr. Wynhoff worked on Kai Anela which was out in Molokini and that one is similar to this where they came in and proposed a settlement to the Board that one however was before determining a contested case. Port Royal, Mr. Wynhoff had not personally been involved with where the Board knows more about that than he.

With that background when they came before the Board with that initial recommendation quite a lot of staff including Russell Sparks had gone out and dived it at least twice and counted 388 specimens damaged or destroyed in one of the damaged fields and the other field Mr. Sparks extrapolated by the damaged field was X number of square feet assuming Y number of specimens per square foot then came up with a total of 532 specimens. In that instance the submittal to the Board didn't really make the recommendation the governing statute gives this Board quite a lot of discretion cause it says up to a \$1,000 per specimen destroyed and it could be anything noting that they have that in other cases, too. Like lumber cases that there are other instances of "up to" and so the question is where in that "up to" number that ought to be is one that is sort of fraught. After they came to the Board with Kai Kanani there was discussion that it would be appropriate to do the same sort of guidance and it's still the Board's discretion, but to give you some guidance on why this is \$200 a specimen and this one be \$500 a specimen or this one \$800 a specimen and that was not contained in the last one and it just said there was 532 specimens and the Board could assess up to \$1,000 per specimen. Those of you who were here would remember how it came about. The respondents at that point were determined to go ahead and asked for a contested case which they were entitled to. The impression Mr. Wynhoff got was it's up to 532 we'll go to a contested case they want a decision so lets take \$532,000 and see how it shapes out in the contested case hearing. After that, the staff and he was sure the Chair was involved generally in this, thought it was appropriate in these things in the future to come to the Board with some kind of metric that would help you in determining or guiding your discretion as to what number might be appropriate and that metric is before you on the next matter Item F-2. They did give it some considerable thought in determining what they thought would be an appropriate recommendation in this case. Mr. Wynhoff knows when he went out there with Russell Sparks and Kamaile was there and they dove with Russell who was very instrumental in helping them come up with this number. The area out there is a beautiful area many of you may have been to Makena and there is some tourism out there and the guy who actually called us, Steve Maderas takes his people out there and dives around, but its not Molokini. It's a relatively flat area, as Russell was describing, with coral coverage low around 5 to 10 percent and the coral heads involved are relatively small.

Chair Thielen said it is nice that Mr. Wynhoff is providing this information, but none of it is contained in the submittal and what she thinks Member Edlao is talking about is in looking at this submittal which recommends a settlement value of a \$130,000 there is no explanation contained in it about looking at that Item F-2 what valuation and also the other thing of concern for her and for members of the Board how much weight is placed upon the aggravating factors and the mitigating factors because as you said the fines are up to a certain amount so the Board may take into consideration certain things like willful or wanting behavior, repeated violations, not taking action the first time when noticed to move and to allow damage to continue. In order for the Board to judge this recommendation it would be helpful to know how that figure was arrived at as a reasonable figure so that they can determine whether they agree or not. Mr. Wynhoff said and he hears that. Because this is the first time they've come out in a contested case and because there is really considerable future litigation with connection with this there was a certain level of internal dialogue between him and his client as to the discussion to what exactly what level of information. As a litigator I only want to come here and say well, layout all the problems with the case, but Mr. Wynhoff hears what the Chair is saying there is no reason that he can't because he could. Chair Thielen said that is a different thing because right now there is a record where it says the valuation is at a certain dollar amount and whatever that may be, it is, you as the person who is mitigating the case may also give recommendation to the Board that based upon other considerations for litigation purposes, for certainty, for fast conclusion we may want to further litigate that dollar amount that is a separate issue which Mr. Wynhoff agreed. The Chair said what is lacking is how is there an explanation of what the value of the resource where Mr. Wynhoff agreed saying that there is no reason the Board has to decide today makes it a little sketchier because...well, actually they could provide it additionally and the Board doesn't have to do it in a public meeting, but they certainly could provide that information and since the Chair gave them the explanation, your right. One issue is you want to hear is what is the valuation and number two what if anything discount is given for the fact there is a litigation and to get it done that kind of stuff and Mr. Wynhoff certainly appreciates that is valuable information for the Board to have which he can certainly provide. The Chair said and the valuation also considering the aggravating or mitigating circumstances where Mr. Wynhoff said all of that was taken into account. There wouldn't be any difficulty in us developing that explanation and providing to you at the next Board meeting or off the record that there is no reason why they can't do that subject to counsel's confirming that. Any information that they provide you will have to be provided to Mr. Kim and his client because they are not allowed to have ex-party communication with you, but he doesn't see that as a problem. Mr. Wynhoff said he would like to play his cards a little bit closer to vest in litigation, but I appreciate that you guys when you guys are the ones who need to decide he is more than happy to disclose it to you and doesn't see any problem in requesting it and since they have requested it he's be very happy to provide it.

Member Gon said as the Chair pointed out the litigation factors are independent of the state regarding the staff's evaluation of the resource base damages and any other factors that may be included in Item F-2 which they could certainly provide per Mr. Wynhoff saying that the people he has talked to and himself feel confident that this is a good

settlement for the purpose of the resource and he would be pleased to provide you the information that you need to see if you decide that you agree with it and if you do that's fine and if you don't that is fine too. It's your call.

Member Edlao made a motion to defer to a later time where Member Morgan seconded.

Mr. Wynhoff said that his point was he would provide it as soon as they could and wouldn't necessarily have to wait until the next public meeting for decision although that would be up to you. He won't wait until the next public hearing to provide it to you which the Chair acknowledged it. The Board passed the motion.

Deferred (Edlao, Morgan)

**Item F-2 Request for Authorization to Use Administrative Penalty Guidelines
when Evaluating Stony Coral Violations under Hawai'i
Administrative Rules Section 13-95-70**

Mr. Polhemus proposed withdrawing the submittal on the recommendation of the Deputy Attorney General who is present at the meeting and he is willing to provide an explanation of his rationale, but he suggested this be done in executive session.

Chair Thielen asked whether DAR had run this through the AG's Office prior to doing the Board submittal. Mr. Polhemus said that he thought they had some consultation and that the submittals did go past the AGs for review. The Chair asked whether the guidelines were submitted to the AGs for review. In reply, Mr. Polhemus introduced Kamaile Nichols, DAR's Legal Fellow to speak as she was involved as the lead on its development. Ms. Nichols said she had discussions with Mr. Wynhoff because it was related to the Kai Kanani case, but she did not do a formal approval process.

Member Edlao moved to go into executive session to consult with the Board's attorney on the Board's rights, duties, privileges, immunities and liabilities. Member Gon seconded.

12:16 PM EXECUTIVE SESSION

12:25 PM RECONVENED

Member Pacheco moved to defer Item F-2 and Member Edlao seconded it. All approved.

Deferred (Pacheco, Edlao)

**Item F-8 Request for Authorization for Review Policy for Take of Protected
Coral and Live Rock Through Division of Aquatic Resources Special
Activity Permits**

Mr. Polhemus noted after speaking to the Deputy AGs that the same concerns that clouded Item F-2 cloud Item F-8, and recommended for similar reasons that it be deferred.

Marti Townsend with KAHEA -- The Hawaiian Environmental Alliance spoke saying that they are saddened to see this deferral because this is so important and had prepared testimony for all the permits concerning the Northwest Hawaiian Islands (NWHI) on the agenda are requests to do activities that do affect corals and so having this kind of policy in place is very important. The issue to keep in mind is a statewide policy to protect corals. The state has articulated a principle to protect all of Hawaii's high valued coral affecting the main Hawaiian Islands and the Northwest Hawaiian Islands and we shouldn't allow the joint regime in the Northwest Hawaiian Islands to dictate State policy and her fear is that the reason why this activity is considered for delay is because of the Federal co-management agencies have concerns about limiting coral collection in the Northwest Hawaiian Islands and this is an example of the tail wagging the dog where you have the State exercising its sovereign jurisdiction over its coral reefs all throughout state waters and the Federal Government affecting State policy because it affects them. In reality what should be happening is the Federal Government should be embracing the State's principles and efforts to protect its resources and its jurisdiction. The Federal Government should allow the State to make whatever decision it sees fit and work with State staff to ensure that Federal activity comply with that. Ms. Townsend's concern is that it is not happening here.

Chair Thielen said that the deferral today is based on whether the Board has authority to adopt this or whether it needs to be done through administrative rulemaking or policy. They are dealing with state technical and legal issues like you do on the federal side.

Ms. Townsend said she encouraged the Board to pass it as written because it is very well written and well thought out and it purports with other efforts to protect coral reefs in other areas that have high value coral reefs and she thinks we should take a visionary step towards ensuring our coral reefs aren't over harvested.

Member Gon said he appreciated Ms. Townsend's testimony with regard to this. It's relatively rare that KAHEA has this kind of testimony on a recommendation when coming before the Board and the Board is also looking for consistent sets of values for their position where Ms. Townsend said it is extremely important because there are so many decisions made about coral harvesting in the mains and the Northwest Hawaiian Islands and its very important to have this kind of guidance.

Stephanie Fried with the Ulu Foundation explained that they have been working on the Northwest Hawaiian Islands for the past decade and helped to write some of the language that was in the Clinton Administrative Executive Orders in 2000 as well as the refuge act. She is disappointed that you are pulling this because this is a step forward in terms of the state exercising proper jurisdiction throughout the entire island chain. Her organization was thrilled to see a strong set of evaluation of coral and to what extent they would be disturbed and they are paranoid that this might change so it does not apply to the

Northwest Hawaiian Islands and they strongly urge not to allow changing any of the existing language that this is what a good policy looks like and they want to ensure these strong robust standards are applied throughout. Ms. Fried referred to the refuge protections reiterating concerns with the Federal process has been using as an excuse to walk away from good solid State protection and hopes the Board considers reinstating what you originally did.

Member Pacheco moved to defer and Member Edlao seconded. All approved.

Deferred (Pacheco, Edlao)

12:30 PM Chairperson Thielen departed and Member Agor filled in as Chair.

Item F-5 Request for Amendment to Papahānaumokuākea Marine National Monument Research Permit PMNM-2009-044, Previously Approved for Dr. Brian Bowen of the University of Hawaii, Hawaii Institute of Marine Biology, to Add Additional Reef Fish Species and Locations

Written testimony had been received and distributed to the Board.

Mr. Polhemus briefed the Board saying that now that the cruise itinerary has been clarified, there will also be a stop at Mokumanamana where (the applicant) would like the opportunity to make collections of deep reef species that was not previously anticipated. The fish species are the same as the shallow species which are common and wide spread and as selected by Dr. Bowen and Dr. Richard Pyle from the Bishop Museum. Dr. Pyle is a noted expert on deep reef diving. Dr. Bowen was present to answer any questions.

Marti Townsend of KAHEA distributed written testimony to the Board applicable to Items F-5, F-6 and F-7 (recognizing that F-7 is being pulled). Ms. Townsend reiterated what Ms. Fried remarked earlier about KAHEA being part of a group of organizations working to protect the Northwest Hawaiian Islands for almost 10 years and they have been dogging this issue for many years. One of the things that they have been asking for years is a cumulative impact assessment which is the ability to determine the extent of risk to resources from human activities in the NWHI advocating strongly for the removal for the ending of commercial fishing in the NWHI and are seeking to extend those visionary protections to apply to all activities as they should. Unfortunately, there is somewhat a double standard where we have regulating agencies engaging in sustenance fishing in the NWHI for example. These are activities they are hoping to see stopped and it is their goal through cumulative impact assessment we would be able to take a reasoned and rationale look at what impacts human activities on the NWHI were having.

KAHEA went through the entire management plan process which was very long and very detailed and one of the expectations that they were given from regulators was that a cumulative impact assessment for science at the NWHI would be conducted during the science plan process. The Science Plan was released in June and received no environmental review of any kind – there was no environmental assessment (EA), there

was no cumulative impact assessment and no cultural impact assessment which are very important oversights. Not only were they disappointed by the obstacles to sound management and the ability to make sound management decisions. KAHEA was extremely disappointed because they recognized that this is a requirement of law. The State and Federal Government both need a cumulative impact assessment to determine whether an activity is significant therefore must be regulated and is not applicable or not able to apply for a categorical exemption or under state rules it's called an exemption notice. Without a cumulative impact assessment and that ability to determine whether an activity is significant it's improper to be issuing exemptions from environmental review both at the state and federal level for activities at the NWHI. When the Science Plan came out there was no cumulative impact assessment and there was no indication from staff that they were ever going to include one.

In July a lawsuit was filed by an attorney who was employed by DAR, but was laid off and he claimed that he was improperly released because he was reporting violations to his superiors where in his complaint he outlined alleging that the DAR had a policy of not abiding by Chapter 343 and the procedural steps for issuing exemptions. Not only were DAR issuing exemptions without the proper foundation for making a decision they weren't issuing exemptions because DAR wasn't going through the decision making process. KAHEA didn't have any choice but to file a suit against the Department of Land and Natural Resources and they are seeking an injunction to prevent permitted activities that should have occurred over the last 120 days to stop and that no permitted permits be issued until environmental assessments are conducted. KAHEA recognized that this will cause a lot of confusion, chaos and inconvenience and that is not their intent. They sent a letter to the Monument Management Board expressing KAHEA's concern that genuinely important and worthy activities such as management for monk seals be continued and are open to working with the regulators to insure that State and Federal laws are abided by as soon as possible. But, it is important for you to know that there has been a serious oversight for what has happened on the state level. The State has the strongest protections and it also has the most valuable fragile aspects of the NWHI ecosystem under its jurisdiction, a huge responsibility. Unfortunately, it appears staff has fallen down on that responsibility, failed to fulfill it and Ms. Townsend looks to the Board to step up and improve management on the state level to make sure that this type of trespass doesn't happen again asking formally for a contested case hearing on the permits that are before the Board today because she was not sure procedurally how things will work as she is filing a complaint seeking injunctive relief and there are permits going forward to just cover her bases she is requesting a contested case hearing.

Ms. Townsend referred to the last paragraph, first page of attachment A of her written testimony capitulates how we expect that there will be additional environmental reviews that will comply with state and federal environmental laws. KAHEA had brought up this concern because the EA was not detailed enough for the Management Plan and regulators made a commitment to her that while the Management Plan didn't address that issue that the Science Plan would be the opportunity to get down to the specifics, unfortunately that was not met.

Attachment B was a whistleblower complaint filed by a former DAR employee which details where the staff decision making fell short of the obligations to ensure state law was complied with stressing that the state has obligations and federal doesn't citing that the constitution requires that the state makes decisions that protect Native Hawaiian cultural and natural resources where the Federal Government doesn't have that kind of responsibility and it's up to the state to do it. But, it hasn't been done on the state level at all for any of the hundreds of permits that has been issued allowing thousands of samples to be collected citing Dr. Bowen's permit as an example. The addition Dr. Bowen is requesting is for several thousands of specimens and this in addition to the 3,000 specimens that he was authorized to take on the first permit. It is the largest take in a no take reserve.

Attachment C is the complaint that KAHEA filed yesterday which outlines and argues the issues of Chapter 343 and the requirements under state law. Ms. Townsend doesn't want this to be an attempt to grind State Government to a halt. The exemption to Hawaii's Environmental Policy Act was a good thing because Chapter 343 is well written. It is a simple four step process to get an exemption where Ms. Townsend explained that the state staff gets a permit into their office, make a determination whether this permit requires HEPA analysis – if it uses state lands and funds it is the State's, would it fit under an exemption which has 10 classes and they identify their expertise to articulate what kinds of activities fit into these classes, then they issue an exemption that says I consulted with other agencies who are not participating in this permitting process to get their expertise and they agree with my assessment that it falls in one of the exemptions and I am writing it down and putting it in the record and am putting it in the Environmental Notice which has not been done.

Attachment D is the letter KAHEA sent to the three co-manager agencies to express their concerns that not only do these violations apply to the state actions, but to the federal actions where the Federal Government has similar actions and requirements. KAHEA is concerned that these use of these exemptions are being misused particularly in the NWHI. Ms. Townsend said that what ever valuable, worthy, essential activities need to be done in the NWHI should continue that we use a more meaningful, transparent permitting process to issue permits in the NWHI. While the Federal law and State law mimic each other in many ways there are key differences. Federal law is interested in environmental protection its goal is to ensure that environmental concerns are weighed equally, economic, social welfare and concerns like that. State law is interested in public participation where its purpose states in the first line of the statute is public disclosure and participation which is the whole point of transparency and accountability. That comes out of two distinct areas: 1. Environmental assessment must have a period of public commentary which is not required in Federal law so when Federal EAs are done it can be done behind closed doors. 2. Cultural impact assessment is unique to State law, Act 50 was passed to ensure when an EA is done that the impacts to Native Hawaiian culture is assessed and there is public comment opportunities referring to the shark culling permits weighing which species is more important sharks or monk seals and this is where public participation is important. Ms. Townsend related in the past the assessment of cultural impacts fell on that the Native Hawaiian cultural working group

for the NWHI, but they can't speak for all Hawaiians and would have been addressed had the state followed the State law and required in the environmental assessment provided a 30 day comment period so all Hawaiian cultural practitioners could weigh in on whether to cull sharks or save monk seals.

Mr. Polhemus said he can't comment on the legal suit because it's on-going. In terms of Chapter 343, joint permitting has been developed in close consultation with the Office of the Attorney General. It wasn't made up by DAR. AG staff cooperated closely with the General Counsel's Offices of the Department of the Interior, the Department of Commerce and from the White House Offices, Council on Environmental Quality. DAR's current contention is they are in compliance with Chapter 343 based on the history they've had of developing joint permitting in consultation with the AG's Office and associated legal staff's from the Federal offices.

Member Agor asked if given this information, if the Board can proceed with voting on Items F-5, F-6 and F-7. Deputy Attorney General, Colin Lau responded saying they could.

Member Goode referred to the verbal request for a contested case hearing on Item F-5. Mr. Polhemus said he heard that and given the Board rendered no decision on the permit he is not sure there is something to contest yet, deferring to the Deputy AG asking whether there has to be a decision before contesting an outcome. Mr. Lau replied in the negative, saying that the public can ask for a contested case hearing before the meeting starts no matter what the outcome. Member Goode asked with the verbal request, whether the Board must proceed with a deferral. Mr. Lau said that the Board can proceed to a decision whether to approve the action or not, but should comply with the requirements of DLNR's rules regarding contested cases, which means they (KAHEA) would still need to request in writing for a contested case with the basis under (HAR) Chapter 13-1. Member Agor asked whether the Board could choose not to act on it. Per Mr. Lau, they could.

Member Pacheco asked what happened to the cumulative impact assessment. Athline Clark, DAR's NWHI Co-Manager who was directly involved with development of the Management Plan and the subsequent Research Plan for the NWHI distributed the Environmental Assessment for the Management Plan. Member Pacheco said that he recalled the Management Plan has a cumulative impact assessment. Ms. Clark said that the Environmental Assessment went through the Chapter 343 process and some of the activities that are before the Board today were specifically analyzed as part of this Environmental Assessment. In addition, the Draft Natural Resources Sciences Plan is out for public comments specifically so that staff can get more public comment on it before they finalize it. Add in the additional public comment process to it and then go through the Chapter 343 assessment process. Staff is not at a point yet where they can determine whether or not within the state they are going to do that because they are still seeking additional public input into the plan where Member Pacheco asked to do what. Ms. Clark said they are not at a place to determine 343 for the Science Plan. It is still a draft and staff is seeking public comment to incorporate it. Once it is incorporated that analysis

will be done to see whether or not it triggers it and if it does they go through the 343 process. Member Pacheco asked that we talked about cumulative impacts in the past, where is it being addressed in the Management Plan or the Natural Science Resources Plan which Ms. Clark said she wasn't sure what Ms. Townsend is specifically referring to other than when you go through an EA process. Primary, secondary cumulative impacts and cultural impacts are assessed as a part of the process for developing an Environmental Assessment or an Environmental Impact Statement and she thinks that is what Ms. Townsend is referring to. Member Pacheco said that one perspective on the Board when they were originally doing the permits for them to look at something like Item F-5 as an example regarding the number of specimens collected coming back to the Board year after year. Initially, the Board had concerns when the permits were coming in staggered and the Board didn't have any idea what was coming ahead asking well, how many are going to be taken in the whole overall scheme with all these permits included that is what he thinks KAHEA is talking about. What kind of matrix is the Board going to have that the Monument going to have for the Board to make decisions on the permits so that they see where each one of these fits in this overall? Mr. Polhemus said that he can answer that in a non-343 context in each year the Board has been briefed by the Monument Co-Trustees on activities during the previous year that the Board has endorsed and permitted. And, contained in that is an analysis of total research impacts for the past year by island and by project that has been laid out to the Board which you would recall those briefings ancillary to the regular Board meetings. In terms of a multi-year cumulative year impact that actually is gradually being generated, but DAR has only done these permits — State or joint in this context since late 2005 where we're now just building up a base where we can look at certain long term trends of human impact site by site noting that he is not talking in the 343 context, but in the standard scientific evaluation of how many specimens came out of where and why. But, that information has been presented to the Board on an annual basis and he recalls the Board was happy to receive it and gave staff good feedback on this summary of activities each time around. Member Pacheco said he understood that. One of the things he had expected for the plan to come out and for the Board to see that ahead of time where there are certain limits or certain numbers pre-set to fill into. Mr. Polhemus said presupposing what is or is not going to be in the final version of a document that is still in its first draft and receiving public comment is in his mind, premature. You have the Management Plan and the Science Plan is in development where the Science Plan is far from done. Not only is staff receiving public comment, but today receiving Board comment and all of this is duly noted. He would say KAHEA led you to believe that document was more or less a final and this stuff could possibly be in it and it wouldn't be in it which is far from the case. This document is in its evolving stages.

Member Pacheco said the relation to some of the other claims, lawsuits and other issues you're basically telling the Board that this permitting process which we know from the past has been bedded from our AG and through the appropriate federal legal quorum and what the Board is doing is the legal process. Mr. Polhemus said within the joint permit process staff's assessment is the majority of the permit activities are exempted under HIPAA either because there is not a trigger or the activity falls within one of the existing DLNR categorical exemptions or the activities are those which were included under the

joint EA associated with the Monument Management Plan. Staff has reiterated to the extent that questions have been raised and different illumination of Chapter 343 in the wake of the whole Superferry case and it brought it to everyone's attention where staff subsequently sent a memo to the Attorney General's Office saying is there anything new about this landscape post Superferry that staff should be aware of and listed a couple questions. Staff has not sought to avoid the issue and even the Department of Transportation had misconceptions of Chapter 343. Currently, staff believes they are in compliance and have not received any guidance contrary to date from the Office of Attorney General.

Member Edlao asked if the Board moves forward, but because of the contested case hearing does it go forward or is it dead in the water. Mr. Lau said first KAHEA has to show they have a right to a contested case hearing. If they do not then their action stands.

Member Edlao asked that this is something Dr. Bowen wanted to add on which Mr. Polhemus confirmed saying that Dr. Bowen has a valid permit and this is only to add on reiterating the unanticipated stop to Mokumanamana.

Member Pacheco moved to go into executive session to consult with the Board's attorney on the Board's rights, duties, privileges, immunities and liabilities. Member Edlao seconded it.

12:58 PM EXECUTIVE SESSION

1:19 PM RECONVENED

Dr. Brian Bowen noted that the larger issue that KAHEA brought up he cannot address, but the specifics as envisioned is while it requests thousands of specimens the permit gives his staff latitude in collecting probably a couple hundred specimens. In addition to what is already permitted is spread out across 1200 miles. To put this issue in perspective, it is estimated that at French Frigate Shoals the ulua in a year take 30,000 tons of this fish, so what we are talking about taking is a drop in the bucket. In regards to the feeling that they are sampling year after the year in an open-ended study he looks forward to demonstrating that is not the case. If everything went perfectly this year they could finish the shallow reef fish connectivity study this year. Nothing ever goes perfect so Dr. Bowen projects doing another year. But, because of some institutional memory with this Board he is hoping to do some debrief studies once this reef fish study is concluded so you are not rid of him yet explaining what the debriefs is according to some are refugia that can replenish the shallow reefs and they have the genetic facilities to find out if that is true both in the main and the NWHI. The only way that the collections would last four years could be termed a waste of time and effort if the study is interrupted or discontinued.

Member Edlao asked that the high number given doesn't mean you'll take that much where Dr. Bowen replied that they never actually get that much - it is just to give staff some latitude. Typically, the cruise will result in a take of somewhere between 400 and a

thousand specimens total and they are talking damsel fish and wrasses that occur by the thousands per square acre. Board member Morgan asked what rough estimate of what percentage of the existing populations your take is. Dr. Bowen said it is infinitely small compared to these populations that run in the tens of millions per atoll and they are talking about taking 30-60. Mr. Polhemus noted that those specimen numbers is capped.

Stewart Urten, a summer legal fellow working for KAHEA, said that it is true that many of the activities permitted might well fall into the exemption categories that are outlined in the regulations now. For example, Dr. Bowen's might fall into the category of basic research. The problem is even if the activity falls into the existing class of exempt categories the agency still has to make a determination that it does fall into this category and the determination is suppose to be recorded in an exemption notice or exemption declaration. That exemption declaration is supposed to be made available upon request to the public. KAHEA believes that the agency hasn't been doing the exemption declarations as part of the process and was one of the examples of the way KAHEA believes the agency has not been following the law exactly which is a concern. They've asked for the exemption declarations and believed that when the regulations say it would be available upon request that meant it literally. The agency has interrupted that to mean to go under HEPA which would cover any government document whether it was specifically made available upon request or not and they are still waiting for a reply from them. The Board might want to know whether these exemption declarations have been made and have a better chance of finding that out quickly than KAHEA can.

Member Edlao asked this request of declaration from who where Mr. Urten said DLNR or DAR. Member Edlao asked whether anyone else has requested it and Mr. Polhemus answered in the negative. Ms. Clark said KAHEA's is the first to request from anyone.

Stephanie Fried spoke saying that the Hawaii's Environmental Policy Act requires that an activity like this be declared categorically exempt and published in the OAQC Bulletin where Ms. Fried reiterated Ms. Townsend's testimony regarding the process. Ms. Fried referred to KAHEA's written testimony regarding the lawsuit mentioning a number of non-compliance in Alaska with state HEPA law. Ms. Fried said that joint permits still need the full state process and documentation of the process reiterating that KAHEA has not been given the exemption notices. She asked her questions from her written testimony. Ms. Fried referred to previous trips that had no funding, no clear benefit and said it was a fun trip which Member Agor found that comment inappropriate. Ms. Fried reiterated about the cumulative impact assessment that it is still not occurring. Problems with the plans that there is no EA and lack of documentation based on HEPA asking the Board to place a moratorium on permits or expansion of existing permits in the NWHI until HEPA is fully implemented

Member Pacheco moved to approve and Member Edlao seconded.

Member Agor said that KAHEA has 10 days to submit its written petition.

Unanimously approved as submitted (Pacheco, Edlao)

Item F-6 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Elizabeth Keenan, NOAA, Papahānaumokuākea Marine National Monument, for Access to State Waters to Conduct NWHI Reef Assessment and Monitoring Programs

Written testimony was distributed to the Board.

Mr. Polhemus reported on permit background noting this is a renewal of work previously permitted. The only collections are a few algae specimens associated with water samples and the applicant is here for questions.

Ms. Townsend reiterated her request for a contested case hearing clarifying that this is not like a check the box situation where someone failed to check it. This is more severe than that because the applicant doesn't have the information to make the underlying decision. Some of the activities in the EA of the Management Plan wouldn't pass legal muster in her mind for an environmental review and others don't. Ms. Townsend referred back to when the Federal agencies presented some things were very detailed, but other things were very fuzzy and the answer by the co-managers response to KAHEA's concerns is that there wasn't an environmental review being done for those things not detailed and said not to worry that the co-managers will come back for it. That opportunity to be more in depth cumulative impact assessment and environmental review for these less detailed activities has passed and is gone. To say that the Draft Science Plan is in draft form is going to be fundamentally different in the final version and they are going to come up with a cumulative impact assessment based on public comment is a little misleading saying that Ms. Townsend has commented on quite a few environment documents and have never seen a final be dramatically different from the draft. Staff kind of have their ideas they tweak it based on counsel, but they need to get public comment on the actual document if anything staff will tell you it's a supplemental draft. The point is you shouldn't be issuing permits until it's done.

Member Gon said he noticed there is a lot of discussion whether or not HEPA has been dealt with in an adequate way and would like as a Board member to receive a summary including something from the AG's Office on just where we stand with regards to those kinds of suggestions. Member Gon is fairly confident that staff has been thinking about this, but he needs to see something. Mr. Polhemus said there is a memo, three pages long outlining questions on Chapter 343, requesting further information from the AG has gone from the Chair's Office to the AG's some time ago and that is already the process which would be the best vehicle to get a response to that and staff can share those responses to the Board.

Board member Morgan moved to approve and was seconded by Board member Goode.

Member Agor said that KAHEA has 10 days to submit its written petition.

Unanimously approved as submitted (Morgan, Goode)

Item F-7 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Anthony Montgomery, State of Hawaii, DLNR, DAR, for Access to State Waters to Document Deep Reef Coral Species

Mr. Polhemus asked this agenda item be withdrawn due to the State's financial situation and lack of resolution on labor savings issues staff cannot anticipate anyone being allowed going on a cruise because they don't know what the staffing maybe, don't know what furlough days maybe and it is problematic to understand how they would furlough someone who is on a ship at sea. There was a moratorium from the top on cruise participation that compromised this item.

Member Edlao moved to withdraw. Member Pacheco seconded.

Withdrawn (Edlao, Pacheco)

Item F-3 Request for Approval of a Special Activity Permit 2009-104 for Mr. Matthew Iacchei of The University of Hawaii, Zoology Department, and Designated Assistants

Mr. Polhemus described that this is a permit to conduct research on Hawaiian spiny and slipper lobsters which involve non-lethal take and a representative is here.

Unanimously approved as submitted (Pacheco, Edlao)

Item F-4 Request for Approval of a Special Activity Permit 2009-109 for Courtney Couch of Cornell University, Department of Ecology & Evolutionary Biology, and Designated Assistants

Mr. Polhemus explained background saying that DAR's coral research biologist, Dave Gulko was the lead on this permit

Unanimously approved as submitted (Pacheco, Gon)

Item C-2 Request for Approval of Right of Entry Agreement for Access and Construction of Nene Release Pen at Haleakala Ranch, Island of Maui, Hawaii

Board member Goode asked whether any permits will be or are required for the Nene Pens where Mr. Conry said it is not required that Member Goode suggested if it does fall into permit requirements, to use square footage at a minimum.

Unanimously approved as amended (Gon, Edlao)

- Item C-1 Request to Extend the Closure of Kahaualea Natural Area Reserve, Island of Hawaii, to the Public Pursuant to HAR § 13-209-4.5 for Public Safety Purposes**
- Item C-3 Request for Approval of the BLNR Chairperson to Enter Into and Negotiate a Contract for the Recovery Youth Conservation Corps Program Coordinator**
- Item C-4 Request to Designate the Ohai Loop Trail and Overlook as a Na Ala Hele "Program Trail" and Feature within the Maui Na Ala Hele Trail and Access Program Inventory.**
- Item C-5 Request to Designate the Kahakapao Loop Trail as a Na Ala Hele "Program Trail" within the Maui Na Ala Hele Trail and Access Program Inventory**

Paul Conry for Division of Forestry and Wildlife noted that the Board received a copy of the trail with the marked changed.

Unanimously approved as submitted (Gon, Edlao)

- Item D-13 Authorize Sale of Remnant by Sealed Bid; Kaaawa, Koolauloa, Oahu; TMK: (1) 5-1-11:055.**

Board member Morgan recused himself.

Mr. Atta informed the Board that this is a request by staff to authorize a sale of a lot as a remnant by three abutting landowners and staff proposed to offer the remnant by sealed bid as a whole. Staff did the analysis on the lot and is recommending a determination by the Board that it is indeed a remnant based on the statutory definition that they previously accepted.

Member Edlao moved to approve and seconded by Member Gon.

Unanimously approved as submitted (Edlao, Gon)

- Item D-1 Rescind Prior Board Action of December 12, 2008, Item D-1, Forfeiture of Revocable Permit No. S-7282, Lara Butler dba Keapana Horsemanship, Permittee, Wailua, Kawaihau, Kauai, TMK: (4) 3-9-02:portion 20.**
- Item D-2 Amend Prior Board Action of August 22, 2008 (D-1) Cancellation of Governor's Proclamation dated April 11, 1917 for Panaewa Forest Reserve, Puna and South Hilo, Hawaii, TMK: (3) 1-6-3; 2-2-46; 2-2-48; 2-2-52; 2-2-56; 2-2-61; 2-4-4; 2-4-49.**

- Item D-4** **After the Fact Consent to 100% Stock Transfer in Pubtime, Inc., Lessee under General Lease No. S-5001, from Louis Santiago, Transferor, to Elaine Nakatani, Transferee, Waiakea, South Hilo, Hawaii, TMK: (3) 2-2-32:10.**

- Item D-5** **Consent to Extension of Lease Term, General Lease No. S-4445 Green Point Nursery, Inc., Lessee, Waiakea, South Hilo, Hawaii, TMK: (3) 2-4-49:26, 27, 28.**

- Item D-6** **Reconsideration of Rent under General Lease No. S-3817 to Maui Family Y.M.C.A., Lessee, for Recreational Camp Site Purposes, Keanae, Maui, TMK: (2) 1-1-2:9.**

- Item D-7** **Amend Prior Board Action of September 26, 2008 (D-7), Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd. For Walkway Stairs, Shower Station, Concrete Pier block Remnants and Landscaping Purposes, Kaanapali, Maui, TMK: (2) 4-2-2: seaward of 4, 5, 7 and 4-3-2: seaward of 26, 27, 28.**

- Item D-8** **Request for Extension of Notice of Default, General Lease No. S-5261, Sand Island Business Association, Lessee, Sand Island, Honolulu, Oahu, TMK: (1) 1-5-41:various.**

Member Goode asked that it mentions some toxic materials and whether it has been removed or remediated where Mr. Atta replied in the negative explaining that it's in current litigation because there is a party in there that is technically not a tenant that got in by allowance of a prior sub-tenant. The tenant is Sand Island Business Association (SIBA) who has a bunch of sub-tenants where one of the tenants allowed another tenant to get on the land, not legally, and that tenant has an auto parts business. This tenant has been in litigation with both the Sand Island Business Association and with the Department of Health (DOH) where SIBA's attorney prolonged this matter and got into a situation where DLNR's tenant asked for DLNR's assistance in getting this worked out. After discussions with DOH they felt that an official clean-up demand by DOH would provide them a position to convince the judge in the existing civil case to show that they are indeed being damaged by the presence of this illegal tenant and give them leverage in this case. Eject the case as well as the clean-up case. Staff is cooperating with their tenant to show there is harm by the presence of this illegal tenant and to get the judge to move. This judge has issued a couple controversial decisions that stalled any clean-up action or any adjustment action in the case and it's more a strategy for the judge in the civil case acts to force some kind of resolution and staff is in concurrence with the timeline requested. Member Goode said his concern was on-going leaching into the ground water where Mr. Atta said that they haven't been able to determine it because through various legal maneuvers this illegal tenant has been able to keep DOH off the premises and has not been able to properly assess the extent of the contamination.

Item D-9 Forfeiture of General Lease No. S-4890, Millicent U. Crawford (Deceased), Lessee, Maunalaha, Honolulu, Oahu, TMK: (1) 2-5-024:007.

Item D-10 Grant of Term, Non-Exclusive Easement to Kevin Fialko for Seawall and Steps Purposes, Black Point, Kahala, Honolulu, Oahu; TMK: (1) 3-5-01:004 seaward.

Item D-12 Second Amendment of Grant of Term, Non-Exclusive Easement S-5827 to Basil Gomez and Donna C. Marron for Seawall and Landscape Purposes, Kaalaea, Koolaupoko, Oahu, TMK: (1) 4-7-016:seaward of 060.

Unanimously approved as submitted (Gon, Goode)

Item E-11 Consent to Assign General Lease No. SP-152, Anna Thuente, Assignor, to Anna Thuente, Miles Kawamoto, Mike Zins, and Gary Miller, Assignee

Dan Quinn with State Parks Division said there are some changes per Chairperson Agor's question which is to list Anna Thuente also known as Anna Knapp-Thuente where the lease reads one way, but she signs it a different to make sure they are covered and staff will work with the AG's Office to make sure it is done properly.

Unanimously approved as amended (Gon, Goode)

Item E-1 Request to Amend Previous Board Approval of Assignment of Lease S-5308 to the May L. Au Living trust, Ahupua'a 'O Kahana State Park

Item E-2 Approval to Extend Three (3) Revocable Permits at Ahupua'a 'O Kahana State Park for Residential, Agricultural and Pasture Purposes

Mr. Quinn noted Items E-1 and E-2 are not the controversial Kahana RPs subject to the recent law, but are existing RPs and an assignment to make sure the next generation is on the lease.

Item E-3 Consent to Assign General Lease No. SP-104, Kathryn Cassel, Assignor, to Kathryn Cassel and James Cassel, Assignee

Item E-4 Consent to Assign General Lease No. SP-118, Kocher Trust, Assignor, to John and Crystal Kocher, Assignee

- Item E-5** **Consent to Assign General Lease No. SP-122, Curtis and Bonnie Lofstedt and Georgia Poppin Trust, Assignor, to Kelley Carswell-Haneberg and David Carswell, Assignee**
- Item E-6** **Consent to Assign General Lease No. SP-126, William and Jean Moragne, Assignor, to Wakefield M. Mist and Robert M. Mist, Assignee**
- Item E-8** **Consent to Assign General Lease No. SP-137, R. Electric, Assignor, to Kevin Huff, Assignee**
- Item E-10** **Consent to Assign General Lease No. SP-144, Mary Summers, Assignor, to Bradley Soria and Margaret Soria, Assignee**
- Item E-12** **Consent to Assign General Lease No. SP-154, A.J. Toulon and Elizabeth Toulon, Cecelia Williams and Peter Baldwin, Assignor, to Hale Poha LLC, Cecelia Williams and Peter Baldwin, Assignee**

Mr. Quinn said the rest are Koke'e leases similar to the one they took up earlier to family and/or friends assignments which needs the Board's consideration.

Member Pacheco asked some of these folks fought for their leases and are turning around to give them away, can they give it to anybody where Mr. Quinn said they could that there is no restriction on that and the key was there wasn't suppose to be a continued re-sale of those leases. A lot of cases family and/or people who have been doing the maintenance are good friends and they are not being paid where Member Pacheco asked how does staff know that and Mr. Quinn replied good faith.

- Item E-13** **Consent to Assign General Lease No. SP-161, Waiyee Carmen Wong and Samuel R. Blair, Assignor, to Daniel Hempey and Patricia Hempey, Assignee**

Unanimously approved as submitted (Gon, Goode)

- Item E-9** **Consent to Assign General Lease No. SP-184, Smith-Waterhouse Family of Koloa, Assignor, to Bert S. Agor, Sr. and Vickie E. Agor, Assignee**

Member Agor recused himself where Member Edlao took over as Chairperson.

Mr. Quinn has no changes

Unanimously approved as submitted (Pacheco, Gon)

- Item H-1** **Request to Authorize Chairperson to Renew and Approve the Annual Disaster Recovery Contract with DRFORTRESS.**

- Item H-2 Request for Delegation to the Chairperson and First Deputy the Authority to Appoint Administrative Hearings Officers for the Conduct of Contested Cases Approved by the Board of Land and Natural Resources**
- Item H-3 Request for Approval to Appoint Thomas P. Rack and Bin C. Li as Administrative Hearings Officers for the Civil Resource Violations System of the Department for a Term of Two Years**

Staff had no changes to these items.

Unanimously approved as submitted (Pacheco, Gon)

- Item L-1 Approval for Award of Construction Contract for: Job No. B76DO70C, Haleiwa Small Boat Harbor, Replacement of Front Row Finger Piers, Haleiwa, Oahu, Hawaii**
- Item L-2 Approval of Supplemental Agreement for Contract No. 55148 Job No. H46C614A, Diamond Head State Monument, Rockfall Mitigation, Oahu, Hawaii**
- Item L-3 Certification of Election and Appointment of Soil and Water Conservation District Directors**
- Item L-4 Permission to Hire Consultants for State Parks TAT & HTA - Funded Project**
- Item L-5 Permission to Contract with Consultants and Contractors for DLNR CIP Projects**
- Item L-6 Request Authorization to Select Consultant(s) and Authorize the Chairperson to Negotiate and Execute Agreements with Consultant(s) and/or Government Agencies as necessary to Implement Chapter 179D HRS, Entitled the Dam and Reservoir Safety Act of 2007 Funded by the Dam and Reservoir Safety Special Fund**
- Item L-7 Approval to Execute Supplemental Contract No. 3 to Contract No. 51532 for Job No. B46CM71A, Lahaina Small Boat Harbor Ferry Pier Planning Lahaina, Maui, Hawaii**
- Item L-8 Request for Authorization for the Chairperson to Negotiate and Execute a Joint Agreement with the US Army Corps of Engineers, for the General Flood Control Plan for Hawaii, Statewide**

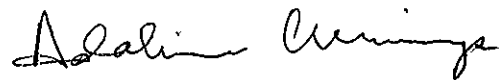
Eric Hirano representing Engineering Division had no changes.

Unanimously approved as submitted (Pacheco, Gon)

Adjourned (Gon, Goode)

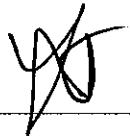
There being no further business, Chairperson Thielen adjourned the meeting at 1:55 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



Laura Thielen
Chairperson
Department of Land and Natural Resources